79-647

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-.....

BARBARA N. COPELAND,

Petitioner,

v.

SAMUEL R. MARTINEZ,
Director Community Services Administration.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Barbara N. Copeland, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 24, 1979.

Opinions Below

The opinion of the Court of Appeals is unreported and is set out in the Appendix hereto, pp. 1a-22a. The opinion of the District Court is reported at 435 F. Supp. 1178 (D.D.C. 1977), and is set out in the Appendix hereto, pp. 23a-34a. The order of the District Court awarding counsel fees, the order that is at issue here, is unreported and is set out in the Appendix hereto at pp. 372-38a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

Question Presented

May a District Court award counsel fees to the United States when it is a prevailing defendant in an action under Title VII of the Civil Rights Act of 1964 under any circumstances in the face of § 706 of that statute which prohibits such an award to the United States?

Statutory Provisions Involved

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(c), provides:

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 717(d) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(d), provides:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Section 706(k) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person. (Emphasis supplied).

Pub. L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, §§ 4, 11, Mar. 24, 1972, 86 Stat. 104.

Statement of the Case

This is an action brought pursuant to 42 U.S.C. § 2000e-16(c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Act of 1972. It was brought on behalf of a Black woman employed by an agency of the federal government, the Community Services Administration, as a GS-11 Program Specialist in the Office of Human Rights. In her complaint, plaintiff, petitioner here, alleged that she had been denied promotion to grade GS-12 because of her race (Black) and sex (female).

Following the trial, the District Court entered an opinion and order on August 23, 1977, awarding judgment to the defendant and dismissing the action. (Appendix pp. 23a-34a). In its decision, the court found that the action was without merit and was brought for the purpose of harassment and in bad faith. The court found no credible evidence that the plaintiff had been

discriminated against, or had suffered harassment or reprisal for having filed discrimination complaints. The court also found that both the plaintiff and one of her witnesses were biased against their immediate supervisor and that their testimony was not credible. The testimony of defendant's witnesses, on the other hand, was found to be credible and to be supported by documentary evidence.

The Court concluded that "plaintiff acted vexatiously, maliciously, and in bad faith in bringing and maintaining this action and has intentionally abused the judicial process." (Appendix, p. 30a.)

As a result of these findings the district court awarded costs and attorneys' fees in favor of the defendant and against the plaintiff (pp. 31a-33a). Subsequently, on the basis of a submission made by the United States Attorney, judgment was issued on October 7, 1977 in a total amount of $3,520.89 which included attorneys' fees in the amount of $3,192.40 (38a.) Plaintiff filed a timely notice of appeal limited to the award of counsel fees against her.

On July 24, 1979, the court of appeals affirmed the district court. It held, despite the language of 42 U.S.C. § 2000e-5(k) prohibiting the award of counsel fees on behalf of the government, and despite the holding of this Court in

Brown v. General Services Administration, 425 U.S. 820 (1976) that Title VII was the exclusive remedy for employment discrimination by government agencies and that its provisions governed the award of counsel fees, that there remained in the district court a residual common law power to award fees under an exception to the "American rule" in cases where suits were brought vexatiously or for harassment (Appendix, pp. 1a-22a). This petition for a writ of certiorari to review that decision followed.

Reasons for Granting The Writ

I.

The Decision of The Court Below Conflicts with This Court's Decision in Brown v. General Services Administration And Other Decisions of This Court.

In Brown v. General Services Administration, 425 U.S. 820 (1976), the government argued and this Court held that when the 1972 amendments to Title VII extended its coverage to the federal government,

> . . . the congressional intent in 1972 was to create an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination.

425 U.S. at 829. Therefore, this Court held that the provisions of Title VII, and specifically 42 U.S.C. § 2000e-5(k),

> govern such issues as venue, the appointment of attorneys, attorneys' fees, and the scope of relief.

425 U.S. at 432 (emphasis added).

Section 2000e-5(k), provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs .... (Emphasis added.)

Despite the holding in Brown that the language of § 2000e-5(k) is exclusive and pre-emptive and despite the explicit prohibition in that section against fee awards to the United States,[1/] both courts below nevertheless held that the government retained a residual common-law right

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1/ The fact that the nominal defendant in a federal Title VII action is the agency head does not change the fact that the action is against the United States and that any counsel fee award inures to the benefit of the government. See, Richerson v. Jones, 551 F.2d 918, 925 (3rd Cir. 1977); Gnotta v. United States, 415 F.2d 1271, 1277 (8th Cir. 1969), and cases there cited; Dugan v. Rank, 372 U.S. 609 (1963); Manhattan Bronx Postal Union v. Gronowski, 350 F.2d 451 (D.C. Cir. 1965); Kennedy v. Rabinowitz, 318 F.2d 181 (D.C. Cir. 1963), aff'd on other grounds, 376 U.S. 605 (1964); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975); Sierra Club v. Hickel, 467 F.2d 1048 (6th Cir. 1972); Simons v. Vinson, 394 F.2d 732 (5th Cir. 1968).

to receive fee awards under the "American rule." Petitioner urges that the decision below is in direct conflict with Brown v. General Administration, supra, and with a long line of decisions that hold that statutes are to be given their plain meaning. See, e.g., Chandler v. Roudebush, 425 U.S. 840, 848 (1976).

In Brown v. G.S.A. the specific issue was whether Congress, when it made the remedies provided by Title VII applicable to the federal government, intended those remedies to be exclusive. Petitioner argued that there was no such intent, and that federal employees had available a range of alternatives to correct employment discrimination. The government argued that Title VII pre-empted all other judicial remedies, urged in its brief that Title VII "defines the scope of the district court's remedial authority", and pointed out that:

> Section 706(k) gives the district court discretion to allow the complainant, if he prevails, a reasonable attorney's fee as part of the costs.

Brief for Respondents, Brown v. General Services Administration, No. 74-768, p. 18.

This Court agreed with the government's position. It first noted that discrimination by the federal government had been prohibited both by the Constitution and by statute prior to the 1972 amendments to Title VII. The existence of

a judicial remedy for such discrimination, on the other hand, was at best problematical. 425 U.S. at 825-27. Thus, the entire purpose of the 1972 Act was to establish and define judical remedies, and the intent of Congress was:

> to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination.

425 U.S. at 829. Moreover, that scheme governed "such issues as . . . attorneys' fees." Id. at 832.

The decision in Brown brings this case squarely within decisions such as Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). There, this Court held that since Congress had, "meticulously detailed the remedies available," in trademark infringement cases, the intent was that those remedies be exclusive. Therefore, the courts were without power to award counsel fees even under one of the recognized exceptions to the American rule.[2/] 386 U.S. 719-21. See also, Hall v. Cole, 412 U.S 1, 9-10 (1973), in which the Court noted that

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2/ Contrast, Wyandotte Transportation Co. v. United States, 389 U.S 191 (1967), where this Court held that since the Rivers and Habors Act of 1899 was not intended to provide exclusive remedies and procedures, the United States could recover expenses of removing ships that were blocking passages.

Congress has the power to circumscribe fee shifting, citing Fleischmann as an example of where that had been done by the enactment of a statute that detailed the remedies available.

In the present case, the government abandoned the position it had successfully urged in Brown, and argued (without citing or discussing Brown) that Title VII did not exclusively govern relief. Rather, there remained in the courts a residual power to award counsel fees independent of § 2000e-5(k). The Court of Appeals accepted that argument by distinguishing Fleischmann and without discussing the language in Brown quoted above which held that the section governs "such issues as . . . attorneys' fees."

In reaching its decision the court below held that fees could be awarded despite the language prohibiting awards in favor of the United States. That decision is squarely in conflict with numerous decisions of this Court upholding the first and most basic canon of statutory construction that:

> The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

Lynch v. Alworth-Stephens Co., 267 U.S 364, 370 (1924); Chandler v. Roudebush, 425 U.S 840, 848 (1976).

Petitioner's position is simple: the statute means precisely what it says. Under no circumstances is the government to receive counsel fees. When a private plaintiff prevails he will receive fees as a matter of course except under very limited circumstances, (Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968)). A private, or state or local government, employer may receive fees when an action has been brought to harass or vexatiously (Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). But the United States may not.

It is clear that Congress believes that that is what the language of the statute means. During the debate over the Civil Rights Attorneys' Fees Act of 1976, a statute designed to bring about uniformity in the various civil rights statutes with regard to attorneys' fees, the question of the circumstances under which defendants could receive fees was was raised.[3/] In two colloquys

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3/ This Court has relied on the legislative history of the 1976 Act in interpreting Title IX of the Education Amendments of 1972, as well as Title VI of the Civil Rights Act of 1964. In Cannon v. University of Chicago, ____ U.S. ____, 60 L.Ed. 2d 560, 569 n.7 (1979), it was noted that:

involving Rep. Drinan, the floor leader for the bill in the House of Reprsentatives, it was made clear that language identical to that found in § 2000e-5(k)[4/] was intended to be a "prohibition against the United States recovering attorneys fees", "under any thesis or under any hypothesis."[5/] Thus, not only does the decision of the

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3/ cont'd.

> Although we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within "the civil rights enforcement scheme" that successive Congresses have created over the past 110 years.

4/ 42 U.S.C. § 1988 provides, in pertinent part, that:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

5/ MR. McCLORY.

* * * *

> It is my understanding that the Senate bill provides for the allowance of fees to attorneys who prevail, for the plaintiff if the plaintiff prevails in court, or for the defendant if the defendant prevails, or with

court below fly in the face of clear statutory language, but it results in curious anomaly. If the United States is sued pursuant to Title VI of the Civil Rights Act of 1964, the award of counsel

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5/ cont'd.

> respect to suits which are brought involving the Internal Revenue Code, if the defendant prevails and can show that such action was filed in bad faith. In other words, the United States is excluded from any attorney's fees under any thesis or under any hypothesis that we might present with regard to this legislation.
>
> * * * *
>
> There is a prohibition against the United States recovering attorneys' fees either in a civil rights case or in income tax matters.
>
> MR. DRINAN. That is pervasive in the whole United States Code.

122 Cong. Rec. H.12152 (daily ed. Oct. 1, 1976).

> MR. WHITE . . . .
>
> Does this act we are attempting to pass now supersede the court decisions. In other words, would the defendant get an equal opportunity to receive attorneys fees, or is the defendant who prevails going to be limited as to whether or not there is a suit brought maliciously or in harassment or with other qualifying features?

fees is governed by 42 U.S.C. § 1988. The legislative history of that statute (see fn. 5, supra) makes it clear that the government may not have counsel fees awarded even in a case found to be brought maliciously. If the United States is sued pursuant to Title VII of the same act, according to the court below, it may receive counsel fees under the same circumstances. It is difficult to believe that Congress could have intended such a result.

II.

This Case Presents An Issue of Substantial National Importance Involving The Enforcement of The Civil Rights Acts

Faced with the language of the statute, Congressional intent in enacting the 1972 amend-

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5/ cont'd.

> MR. DRINAN. If the gentlemen will yield, I will state that the U.S. Government may not have attorney fees awarded. In other cases, it belongs in the proper discretion of the judge. If the suit is of a vexatious and harassing nature, the defendant obviously should be given his reasonable attorney fees. I think it is all carefully regulated by a body of law which goes back at least 50 years. (Emphasis added.)

122 Cong. Rec. H. 12155 (daily ed. Oct. 1, 1976).

ments, and Congress' understanding that the United States may not receive counsel fees in civil rights cases under any circumstances, the court below rested its decision on its view as to the appropriate policy considerations in determining whether fees should go to the government. In the court's view, the policy of deterring baseless lawsuits should apply to cases brought against the government.

Petitioner urges first, that for the court to substitute its judgment as to proper policy for that clearly expressed by Congress, is in conflict with this Court's decision in Chandler v. Roudebush, 425 U.S 840 (1976). There, the government argued that despite the clear language of the statute, a federal employee should not receive a trial de novo in a Title VII action, because such trials would defeat the underlying policies of the statute. This Court rejected the argument on the ground that, "Congress has made the choice, and it is not for us to disturb it." 425 U.S. at 863-64. Similarly here, Congress has chosen to deny the United States the right to counsel fees, and that choice is binding on the courts.6/

6/ In a rather cryptic footnote the court below suggests that there might be some constitutional impediment to Congress' denying counsel fees to the government. See, App., P. 22a, n.69. How-

Second, petitioner urges that the court below improperly balanced the policy interests involved and ignored those considerations which support the Congressional choice to deny fees to the government. When it passed the 1972 amendment to Title VII, Congress was acutely aware of the necessity for correcting entrenched discrimination in the federal service. The Senate Committee Report on S. 2515, the Senate version of the 1972 Act, emphasized the special importance of moving against discrimination in Federal Employment:7/

> The Federal government, with 2.6 million employees, is the single largest employer in the Nation. It also comprises the central policymaking and administrative network for the Nation. Consequently, its policies, actions, and programs strongly influence the

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6/ cont'd.

ever, this Court has already made it clear that Congress has the power to circumscribe "fee-shifting" even where it "would be appropriate as a matter of equity." Hall v. Cole, 412 U.S. 1, 9 (1973).

7/ The legislative history of the 1972 amendments of Title VII has been compiled in Sub Com. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972) (hereinafter "Legislative History").

> activities of all other enterprises, organizations and groups. In no area is government action more important thatn in the area of civil right. 8/

During the debates and in the House and Senate reports, excerpts were taken from a study released by the Civil Service Commission, Minority Group Employment in the Federal Government, (1970), which showed that minorities represented 19.4% of the total employment in the federal government, but that they were heavily concentrated in the lower grade levels.9/ In view of these statistics, the Senate Committee Report explained that there was a particular need not only to improve the administrative process for dealing with discrimination, but also to ensure free access to the courts.

> The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. . . . The bill . . . enables the aggrieved Federal employee (or applicant for employment) to file an action in the appropriate U.S. district court 10/

8/ Legislative History at 421.

9/ Id. at 422. 43.4% of the workers in the lowest 8 of the 18 GS (General Schedule) grades were minority. Similarly, 76.7% of women employees were in grades GS-1 through GS-6.

10/ Id. at 425.

See, Brown v. General Services Administration, 425 U.S. at 827-28.

Congress believed, then, that the need for aggrieved federal employees to bring Title VII suits was especially great; therefore, the deterrent of the prospect of liability for fees if the employee loses, would be particularly inappropriate. It must also be assumed that Congress was aware that there were other deterrents to the bringing of baseless lawsuits. Any plaintiff is faced, in such litigation, with taking on the government and its vast resources of attorneys, funds, and support personnel. If the suit is lost, the plaintiff will be liable for costs, which can be substantial in a Title VII suit, and which the government is not prohibited from recovering by § 2000e-5(k).11/ Thus, it was

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11/ The Department of Justice has adopted the policy of seeking costs in Title VII suits only where the plaintiff brought the action in bad faith, the suit was pursued in a harassing or vexatious manner, or a claim was litigated that was patently goundless or frivolous. Memorandum To All General Counsels and All United States Attorneys from the Assistant Attorney General, Civil Division, April 14, 1978. See, Jaspers v. Alexander, 15 FEP Cases 1234 (D.D.C. 1977). The Department of Justice memorandum states that "motions for costs are intended to deter baseless or unreasonable claims."

reasonable for Congress to decide to exclude the additonal threat of a counsel fee award.

When one looks to the enforcement scheme established by Title VII, it is apparent that there is a clear basis for distinguishing between the federal government and other defendant employers when it comes to attorney's fees. The federal government has substantial responsibility for enforcing the provisions of Title VII against private and state and local government employers. The responsibility goes beyond administrative enforcement since the EEOC and the Department of Justice have the authority both to bring originally, and to intervene in, court actions. Because a major role enforcement of the Act lies with the public attorney general, it was reasonable for Congress to decide that not all actions by would-be private attorneys general should be encouraged. Thus, counsel fees are obtainable by a private or state or local government employer in cases that are found to have been unfounded and vexatious.

On the other hand, the sole means of court enforcement of Title VII against the federal government lies with private persons. There is no public attorney general who can bring such law-

suits.[12] Given this fact, and given the great imbalance of resources already existing between a single federal employee on the one hand, and the federal government on the other, it was wholly reasonable for Congress to decide that the in terrorem effect of the possibility of an award of counsel fees under any circumstances would seriously inhibit the enforcement of the Act.

Indeed, Congress made precisely this judgment when it, in 1964, barred awards of counsel fees in behalf of the government as a plaintiff. To our knowledge, the United States has never sought counsel fees under the American rule when it was the plaintiff in a Title VII action.[13] However, it is possible for a defendant to litigate a case in bad faith and with "obdurate obstinance"; counsel fees have indeed been awarded to prevailing plaintiffs under such circumstances. See, e.g., Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963). The policy considerations underlying Title VII --the effective and

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12/ See, Parker v. Califano, 561 F.2d 320, 331 (D.C. Cir. 1977).

13/ Indeed, in the brief filed by the United States in Christiansburg Garment Co. v. EEOC, No. 76-1383, it was acknowledged that under § 2000e-5(k), ". . . the Commission cannot recover attorney's fees as plaintiff." Brief for Respondent, p. 24.

speedy ending of employment discrimination--would be served by allowing the United States counsel fees where a defendant employer has litigated in bad faith and for delay. Nevertheless, Congress clearly declined to allow them, again because of the imbalance of resources when the United States is a litigant[14/].

Congress has consistently determined to keep from the government the weapon of attorney's fees because of the oppressive impact its threat could have on the other litigant. The decision of the court below thus has broad implications. By permitting counsel fees to the government when it is the defendant employer the decision creates a dissymemtry in the congressionally mandated scheme that is without justification, is contrary to the policies of Title VII, and could have a significant impact on civil rights enforcement across the nation.

14/ See, e.g., the remarks of Rep. Senner at 110 Cong. Rec. 1640 (1964), discussing the attorneys' fees provision in Title II of the 1964 Act. After pointing out that under the section, the language of which is identical to that enacted in Title VII, private plaintiffs and defendants could get attorneys' fees as part of the costs, Rep. Senner stated, "The United States, however, could not recover any amount for attorney's fees if it won . . . ."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

Decisions of the

Courts Below.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2059

BARBARA N. COPELAND, APPELLANT

v.

SAMUEL R. MARTINEZ, Director
Community Services Administration

No. 77-2060

BARBARA N. COPELAND, APPELLANT

v.

SAMUEL R. MARTINEZ, Director
Community Services Administration

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil 76-1156)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued 16 November 1978

Decided 24 July 1979

Judgment entered this date ←

Charles Stephen Ralston with whom *Alexander G. Park* and *Bill Lann Lee* were on the brief, for appellant.

Alice L. Mattice, Attorney, Department of Justice, a member of the bar of the Supreme Court of Massachusetts pro hac vice by special leave of Court with whom *Earl J. Silbert*, United States Attorney, *Barbara Allen Babcock*, Assistant Attorney General and *Robert E. Kopp*, Attorney, Department of Justice, were on the brief, for appellee.

Charles E. Hill and *Douglas L. Parker* were on the brief, for Amicus Curiae, urging reversal.

Also *Paul Blankenstein*, Attorney, Department of Justice entered an appearance, for appellee.

Before: WRIGHT, *Chief Judge*, MCGOWAN and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The sole question in this appeal is whether the District Court may award attorneys' fees to the United States in a case where it has been sued "vexatiously and in bad faith" under Title VII of the Civil Rights Act of 1964. Appellant maintains that such an award is barred by the plain language of the provision for attorneys' fees contained in the Act. We disagree. In light of the Act's legislative history and underlying purposes, we think that it left undisturbed the equitable principles which historically have permitted a court discretion to award attorneys' fees in circumstances like those of this case. Accordingly, we affirm the judgment of the district court.[1]

[1] Judge Pratt's opinion is reported at 435 F. Supp. 1178 (D.D.C. 1977).

I. FACTS

The facts of this case, as they were found by the trial court, are not disputed and may be recounted briefly. Plaintiff-appellant, Ms. Copeland, is a black woman employed by the Community Services Administration. Since 1974 she has worked as a program specialist of grade GS-11 in the Office of Human Rights, previously she held other positions with the CSA and its predecessor agency, the Office of Equal Opportunity. Plaintiff's two most recent promotions were the result of filing grievances unrelated to racial or sex discrimination.

From April 1975 through December 1976 plaintiff's supervisor was Carlos Ruiz, the Associate Director for Human Rights at CSA, against whom plaintiff filed unsuccessfully some nine grievances and Equal Employment Opportunity (EEO) complaints. A complaint filed with the CSA on 27 June 1975 is the subject of this suit. It alleged, *inter alia*, that plaintiff was denied career ladder promotions and merit promotions, was denied the opportunity for training, and was harassed by her supervisors, all because of her race and sex.

After a trial the district court found that plaintiff had "failed to establish even a *prima facie* case of discrimination."[2] The court observed that at all relevant times blacks comprised 80 percent of the staff of the Office of Human Rights, that women outnumbered men by a ratio of two to one, and that Ruiz had "promoted mostly black females."[3] The court specifically found that plaintiff had proffered "no credible evidence" to substantiate her allegations. Rather, the evidence showed that the promotions in question had been denied for wholly objective and permissible reasons.

[2] *Id.* at 1181.

[3] *Id.* at 1179.

Finding, moreover, that the plaintiff had "acted vexatiously, maliciously, and in bad faith" [4] in maintaining the suit, and in so doing had "intentionally abused the judicial process," [5] the district court awarded the government reasonable attorneys' fees as part of its costs. The court found specifically that plaintiff had presented "no evidence" of discrimination "other than her bald, abstract, and repetitive allegations." [6] Both of plaintiff's witnesses "were shown to be intensely biased" against Mr. Ruiz; and one admitted to "hav[ing] designs" on Mr. Ruiz's job.[7] Plaintiff and this witness were "completely incredible" and were found to be "conduct[ing] a vendetta" against Mr. Ruiz and others in the CSA management, "harassing them by virtually every means available including use of the EEO process to bring baseless charges of discrimination." [8] The instant suit, the court concluded, was the "culmination of a long series of intentionally vindictive and abusive actions taken to harass [plaintiff's] superiors." [9]

The district court relied, in making the award, on traditional equitable principles, "separate and apart from [Title VII]," [10] permitting an award of fees to a litigant if the losing party has acted in bad faith. Plaintiff, *not disputing the district court's finding of bad faith*, brought this appeal solely to review the legal question whether the attorneys' fee provision of Title VII permits an award to a government defendant "under any circumstances." [11]

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[4] *Id.* at 1181.

[5] *Id.*

[6] *Id.* at 1180.

[7] *Id.*

[8] *Id.* at 1180-81.

[9] *Id.*

[10] *Id.* at 1181 n.3.

[11] Brief for Plaintiff at 4.

II. Analysis

A. *The American Rule and Its Exception in Cases of Bad Faith*

Although it is the general rule in the United States that in the absence of a statute [12] or enforceable contract [13] providing otherwise, each litigant pays his own attorneys' fees,[14] there exist certain well-settled exceptions permitting an award of fees in particular situations. Thus a court may permit a party preserving or recovering a fund, benefiting others in the same manner as himself, to recover his costs, including attorneys' fees, out of the fund or directly from the other parties enjoying the benefit.[15] Also, "a court may assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant . . . .' " [16] Finally, and at issue in this case, a party ordinarily may be permitted his attorneys' fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .' " [17]

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[12] *See* note 28 *infra.*

[13] *See, e.g., Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

[14] *See Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412, 415 (1978); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 257 (1975).

[15] *See Alyeska*, 421 U.S. at 257-58; *Hall* v. *Cole*, 412 U.S. 1, 5-6 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Trustees* v. *Greenough*, 105 U.S. 527 (1882).

[16] *Alyeska*, 421 U.S. at 258 (quoting *Fleischmann Distilling Corp.*, 386 U.S. at 718 (citing *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 426-28 (1923))).

[17] *Alyeska*, 421 U.S. at 258-59 (quoting *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129

The rationale for "fee-shifting" in instances of bad faith is essentially punitive.[18] It is contemplated that the assessment of fees in such cases will deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process. Of course, recovery of fees incidentally compensates the prevailing party for costs which should not have been incurred, and to that extent it is not inconsistent with the presumption underlying the general rule disfavoring fee awards, that the parties act in good faith, although not with perfect knowledge of the merits of their claims. Relying upon this exception, courts have assessed attorneys' fees against both plaintiffs and defendants shown to have acted in bad faith.[19]

In the instant case it is not disputed that plaintiff acted in bad faith in bringing her Title VII suit, nor is it disputed that factually this case falls well within the equitable exception permitting an award of fees when compelled by "overriding considerations of justice." [20] That is, of course, not an end to the matter, "for even where 'fee-shifting' would be appropriate as a matter of equity, Congress has the power to circumscribe such relief." [21] Although "Congress has not repudiated the judicially fashionable exceptions to the general rule against allowing substantial attorneys' fees," [22] still, as the Supreme Court restated in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards [in suits brought under federal law] are matters for Congress to determine." [23]

(1974); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4 (1968); *Vaughn* v. *Atkinson*, 369 U.S. 527 (1962); *Bell* v. *School Bd.*, 321 F.2d 494 (4th Cir. 1963); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951); 6 J. MOORE, FEDERAL PRACTICE, ¶ 54.77(2), at 1709 (2d ed. 1972); *see generally* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 889-95 (1975).

[18] *Hall* v. *Cole*, 412 U.S. at 5.

[19] *See* Dawson, *supra* note 17, at 890 nn.155-56 (citing cases).

[20] *Fleischmann Corp.*, 386 U.S. at 718.

[21] *Hall* v. *Cole*, 412 U.S. at 9.

Plaintiff contends that Congress in this case has foreclosed an award of fees to the United States "under any circumstances." [24] The putatively preemptive language is contained in § 706(k) of the Civil Rights Act of 1964,[25] which was made applicable to employment discrimination suits against the federal government in 1972 by the addition to Title VII of § 717(d).[26] Section 706(k) provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[27]

Title VII is thus one of numerous statutes "granting or protecting various federal rights" [28] which contain express exceptions to the general rule against recovery of

[22] *Alyeska*, 421 U.S. at 260.

[23] *Id.* at 262.

[24] Brief for Plaintiff at 6.

[25] 42 U.S.C. § 2000e-5(k) (1976).

[26] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 11, § 717, 86 Stat. 103, 111, 42 U.S.C. § 2000e-16(d) (1976).

[27] 42 U.S.C. § 2000e-5(k) (1976).

[28] *Alyeska*, 421 U.S. at 260 & nn.33-35 (collecting statutes); *Christianburg Garment Co.*, 434 U.S. at 415-16 nn.5-7 (collecting statutes).

attorneys' fees. Much of the law governing fee awards under § 706(k) is settled. Thus, an individual prevailing as a plaintiff in an employment discrimination suit, including one brought against the federal government, "ordinarily is to be awarded attorney's fees in all but special circumstances." [29] Also, the provision has been construed to permit an award of fees to a private employer who prevails, upon a finding that a suit, including one brought *by* the United States, was "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." [30]

Plaintiff naturally concedes that had her suit been one against a private employer, the award of attorneys' fees would have been appropriate. Plaintiff argues rather plausibly, however, that the language of § 706(k), allowing fees to prevailing parties "*other than the Commission or the United States*," [31] may fairly be read as a general prohibition of awards in favor of the federal government. We do not find the statutory language so unambiguous, however. Moreover, nothing in the concededly sparse legislative history evinces any intent to extinguish, in suits involving the federal government, the historic power of equity courts to assess attorneys' fees against a party who has acted in bad faith.[32] And we decline to infer such an intent, especially when to do so would plainly contradict one of the acknowledged purposes of § 706(k) —"to 'deter the bringing of lawsuits without foundation.' " [33]

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[29] *Id.* at 417 (footnote omitted); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975); *see also Northcross* v. *Board of Educ.*, 412 U.S. 427, 428 (1973).

[30] *Christianburg Garment Co.*, 434 U.S. at 421.

[31] 42 U.S.C. 2000e-5(k) (1976) (emphasis added).

[32] *See* notes 40-48 and accompanying text *infra*.

[33] *Christianburg Garment Co.*, 434 U.S. at 420 (quoting remarks of Senator Lausche, 110 CONG. REC. 13668 (1964)).

B. *Congressional Intent Governing § 706(k)*

The parties have fashioned predictably differing arguments from four sorts of evidence of what Congress may be supposed to have intended. We review in turn (1) the language of § 706(k), (2) its legislative history and that of comparable provisions, (3) probable inferences from the structure of the Civil Rights Act of 1964, and (4) the apparent purposes underlying the fee provision.

1. *Statutory Language*

Until Title VII was amended by the Equal Employment Opportunity Act of 1972, it did not permit employment discrimination suits against the federal government. Consequently, prior to the amendments, the United States (or the Equal Employment Opportunity Commission) could appear in a Title VII suit *only as a plaintiff*, bringing or intervening in a suit on behalf of a private or non-federal government employee.[34] *These were the only instances to which the language affecting fee recovery by the U.S. could apply.* And in these instances, if the United States or the Commission prevailed in the suit, it clearly could not recover attorneys' fees under § 706(k) in the same manner as other prevailing plaintiffs could.

Federal employment discrimination was proscribed by § 717 added to the Civil Rights Act of 1964 [35] by a 1972 amendment.[36] Section 717(c) [37] permits an aggrieved employee to file a civil action in a federal court seeking

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[34] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 706, 707, 78 Stat. 259, 261 (current version at 42 U.S.C. §§ 2000e-5, 2000e-6 (1976)).

[35] 42 U.S.C. § 2000e-16 (1976).

[36] *See* note 26 *supra*.

[37] 42 U.S.C. § 2000e-16(c) (1976).

review of his claim of employment discrimination after relief has been denied in the agency which is alleged to have discriminated. Section 706(f) through (k), governing various precedural matters, were incorporated by § 717(d)[38] "as applicable" to suits by federal employees. Section 706(k) is, of course, the attorneys' fees provision with which we are concerned.

Plaintiff, somewhat indifferent to the manner in which the various provisions were accreted, argues that their intended operation is apparent. Plaintiff supposes initially that the United States was prevented by § 706(k) from recovering fees as a plaintiff "under any circumstances." From this plaintiff concludes that § 706(k), made applicable to suits against the federal government by § 717(d), likewise forecloses an award on behalf of the United States as a defendant in all cases. We have already noted that plaintiff's construction is linguistically plausible. It is not, however, the only sensible reading of the statute; nor is it the one we suppose most harmonious with the purposes of the Act.

The government, of course, takes a quite different position. It suggests that the language prohibiting awards to the United States may apply only where the government is a plaintiff, the circumstance contemplated when the language was composed in 1964. Thus the government opines that § 706(k) may in fact affirmatively authorize the award of attorneys' fees to the United States as a defendant in the same manner as it authorizes the award of fees to a prevailing defendant in the private sector. Whether the language of § 706(k) may be parsed in the somewhat extraordinary manner suggested by the government, the instant case does not require us to decide. We hold only, as the government alternatively argues, that § 706(k) does not preclude a court from awarding

[38] 42 U.S.C. § 2000e-16(d) (1976).

the United States its attorneys' fees when it has been sued in bad faith.

We think the excepting language, supposing it applicable to the federal government as a defendant, was meant to exclude the United States only from the *statutory* allowance of fees, governed by the expansive "prevailing party" standard, and to leave undisturbed the narrow equitable exception in cases of bad faith.[39] This construction appears to us both unstrained and ultimately more consistent with the purposes of § 706(k) than that advanced by plaintiff.

[39] Although it might have been rational for Congress in 1972 to have concluded that the United States *as a defendant* should be entitled to its attorneys' fees in the same manner as other defendants, it is improbable that it would have chosen to do so through the language of §§ 717(d) and 706(k). Section 717(d) incorporates § 706(k) "as applicable" to suits against the federal government. It is undisputed that § 706(k) applies to such suits at least insofar as it permits awards to prevailing plaintiffs. We think it fairly implausible that Congress intended through § 717(d) to incorporate all of § 706(k) save for the phrase "other than the . . . United States." Rather, a more sensible reading of the sections is that when the federal government is a defendant, it is a "party" within § 706(k) and as such is excluded from the statutory recovery of fees just as it is as a plaintiff. We are especially hesitant to reach a contrary construction which, having no warrant in the text, is not compelled by an unambiguous Congressional purpose. No such purpose is apparent.

Finally, it may be argued that if the same standard applies to the federal government, whether a plaintiff or defendant, it should in both cases preclude recovery on equitable grounds. Although in some circumstances we might conclude that a statutory provision for attorneys' fees had preempted preexisting equitable grounds, *see Christianburg Garment Co.*, 434 U.S. at 419 n.13; *cf. Byram Concretanks, Inc.* v. *Warren Concrete Prods. Co.*, 374 F.2d 649, 651 (3d Cir. 1967), we do not think that is this case, *see* pp. 15-17 *infra*.

2. *Legislative History*

The parties are in agreement that pertinent legislative history is sparse and fairly unenlightening. Somewhat relevant is a colloquy between Senator Dominick and Senator Javits in the course of debate on the 1972 amendments. Senator Dominick had submitted an amendment to the pending Senate bill which, *inter alia*, would have struck the provision which became § 717(d), incorporating § 706(k). Senator Javits, in turn, introduced an amendment striking that portion of the Dominick amendment, which Senator Dominick accepted.[40] It

[40] Senator Javits, offering the amendment to strike, said:

> If you refer to those provisions, insofar as they are applicable, you find that the main point is that where the complainant is suing in court, you have arrived at the stage of the proceeding where he has that remedy, and in such circumstances as the court may deem just, the court may appoint an attorney for the complainant and authorize the commencement of the action without the payment of fees, costs, or security.
>
> Mr. President, that is a very important right for the individual, just as it is a very important right for a Government employee, for the individuals involved are not, in the main, high salaried, in that those who would be likely to sue in these equal employment opportunity cases are fairly modest people.
>
> So I see no reason, Mr. President, why in the one case, to wit, that of the normal complainant who is not a Government employee with a remedy in court, that complainant shall be the beneficiary of a court-appointed lawyer, and not have to pay these costs or securities, and why this provision should be stricken out when it comes to a Federal Government employee who has to sue and is also a person, because that is the generality of the cases, of modest means.
>
> So the motion which I make is to strike out the provision of the Dominick amendment which would withdraw that opportunity from a Government employee. I do not see how we can very well make that distinction.

[Continued]

appears from the exchange, as we observed in *Parker* v. *Califano*,[41] that both Senators were concerned that federal employees be assured certain assistance afforded private litigants, including the customary award of attorneys' fees to the prevailing party. That Congress intended to permit prevailing federal employees to recover their attorneys' fees is unexceptionable. The colloquy sheds little light, however, on the matter *sub judice*, except insofar as the Senators, aware that § 706(k) applied to suits against the federal government, may be charged with intending one or another somewhat probable construction of the statutory language. Thus we are again remitted to linguistic argument, and we have already concluded that the text is not dispositive. In sum, we think it fair to say that the 1972 legislative history is

[40] [Continued]

118 CONG. REC. at 954 (1972).

Senator Dominick accepted the amendment and stated:

> Mr. President, I want to say for the record that this particular amendment language was included, as the specific provisions of the bill deal only with Federal employees for whom we had a different procedure. They go through their own agencies and then they have the right as a Federal employee to go to the civil service board or to go through the Federal court system. The amendment to strike the language was included because the language to be struck was thought to be inappropriate to the specialized grievance procedures adopted in committee for Federal employees. A closer reading of sec. 706(g) through (w) [the provisions that would have been stricken by the proposed Dominick amendment] does indicate that language for providing attorney's fees and waiving court costs are applicable.
>
> Therefore, I have no objection to the Senator's amendment, and if he would want to withdraw his yea and nay request, that would be fine with me, and we can accept the amendment.

118 CONG. REC. 956 (1972).

[41] 561 F.2d 320, 335-36 (D.C. Cir. 1977).

unilluminating. We observe merely that our construction is not inconsistent with what little history there is.[42]

More helpful to plaintiff's argument are portions of the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976.[43] The Act permits the courts to award attorneys' fees to the "prevailing party, other than the United States" in suits brought under a number of statutes,[44] at least one of which contemplates suits against the United States.[45] The Senate Report states that the Act "follows the language of Title II and VII of the Civil Rights Act of 1964" and that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." [46] Moreover, the bill's sponsors in the House of Representatives apparently thought not only that the rule in the 1976 statute was the same as that in the earlier acts, but also that under that rule, "the United States is excluded from any attorneys' fees under any thesis or under any hypothesis." [47]

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[42] For a review of such legislative history as exists, see *Parker* v. *Califano*, 561 F.2d at 333-39.

[43] Pub. L. No. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988.

[44] The Act permits an award of attorney's fees to the "prevailing party" in actions brought under seven specific sections of the United States Code: 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, & 2000 d. *et seq.*; and 20 U.S.C. § 1681 *et seq.* *See* 42 U.S.C. § 1988 (1976); H. REP. No. 94-1558, 94th Cong., 2d Sess. 4 (1976).

[45] Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 252, 42 U.S.C. § 2000 d. *et seq.* (1976); *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

[46] S. REP. No. 94-1011, 94th Cong., 2d Sess. 2, 4 (1976).

[47] 122 CONG. REC. H12152 (daily ed. 1 Oct. 1976) (remarks of Congressman McClory); *see also id.* at H12155 (remarks of Congressman Drinan).

Although the cited passages from the legislative history of the 1976 Act deserve some weight "'as a secondarily authoritative expression of expert opinion,'" [48] they are not nearly as persuasive as would be statements made contemporaneously with the enactment of the statute we are construing. Consequently although the question is not free of difficulty, we are not convinced by these casual subsequent remarks that Congress, acting in 1972, intended to foreclose an award of attorneys' fees to the United States in such cases as this.

3. *Inferences from the Structure of Title VII*

Plaintiff advances a second, somewhat different theory of preemption relying on the Supreme Court's decision in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*[49] In *Fleischmann* the Supreme Court held that § 35 of the Lanham Act [50] precluded an award of attorneys' fees as a separate element of recovery in a suit for trademark infringement. The Court reasoned that, since § 35 "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed," Congress must have intended the express remedial provisions of § 35 "to mark the boundaries of the power to award monetary relief in cases arising under the Act." [51] Plaintiff contends that, whether or not the legislative history expressly discloses any relevant intent, the reasoning of *Fleischmann* dictates a similar result in this case. Recalling for her minor premise that the Supreme Court in *Brown* v. *General Services Administration* said that Title VII's "careful blend of administrative and judicial

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[48] *Parker* v. *Califano*, 561 F.2d at 339 (quoting *Bobsee Corp.* v. *United States*, 411 F.2d 231, 237 n. 18 (5th Cir. 1969)).

[49] 386 U.S. 714 (1967).

[50] 15 U.S.C. § 1117 (1976).

[51] *Fleischmann Corp.*, 386 U.S. at 719, 721.

enforcement powers" [52] were intended to be "exclusive and pre-emptive," [53] plaintiff concludes that the question of attorneys' fees is governed exclusively by § 706(k).

Plaintiff's reliance on *Fleischmann* appears somewhat curious. At issue in *Fleischmann* was the judge-made rule permitting an award of attorneys' fees upon a showing that a trademark had been infringed deliberately or willfully. The practice, though supported by some judicial authority, was not among the customary exceptions to the American rule. The Supreme Court held merely that it would not find an implied exception under a statute which, containing no attorneys' fees provision whatsoever, otherwise exhaustively prescribed the intended relief. The instant controversy is quite different. We are required to decide not whether to create a novel exception, but rather whether Congress intended to abrogate a thoroughly settled one. Setting to one side the effect of § 706(k), we are most reluctant to find that Congress has by implication eliminated sound preexisting grounds for an award of attorneys' fees.[54] Moreover, not only is Title VII's open-ended provision for any "other equitable relief as the court deems appropriate" [55] unlike the "meticulously detail[ed]" remedies under the Lanham Act,[56] but we doubt that even precisely detailed affirmative relief logically implies anything at all about the court's inherent power to award fees to a harassed *defendant*.

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[52] 425 U.S. 820, 833 (1976).

[53] *Id.* at 829.

[54] Our reluctance is akin to the presumption against construing statutes to have abrogated by implication common law rights. *See, e.g., Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961); *See generally*, 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 61.01, at 41-42 (4th ed., Sands, ed. 1974).

[55] 42 U.S.C. § 2000e-5(g) (1976).

[56] *See also Hall* v. *Cole*, 412 U.S. at 10; *Mills* v. *Electric Auto-Lite*, 396 U.S. at 391.

The Supreme Court's recent opinion in *Christianburg Garment Co.* v. *EEOC* confirms our view that, at least apart from the prohibition which plaintiff finds in the language of § 706(k), the remedial scheme of Title VII did not preempt the customary exceptions to the American rule. There the Court said:

> It seems clear, in short, that in enacting § 706(k) Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action. As pointed out in *Piggie Park* [390 U.S. 400 (1968)], if that had been the intent of Congress, no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith.[57]

Thus plaintiff's preemption argument derives no support from *Fleischmann*, and we are once again thrown back upon the language of § 706(k), which we find inconclusive.

4. *The Purposes of § 706(k)*.

Finally, we believe an award of attorneys' fees in this case is wholly consistent with the purposes of § 706(k). The Supreme Court had occasion in *Christianburg* to review those purposes, which are vaguely disclosed by what little history there is from 1964. It said:

> The only specific reference to § 706(k) in the legislative debates indicates that the fee provision was included to "make it easier for a plaintiff of limited means to bring a meritorious suit." [58] During the Senate floor discussions of the almost identical

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[57] 434 U.S. at 419.

[58] Remarks of Senator Humphrey, 110 CONG. REC. 12724 (1964).

attorney's fee provision of Title II, however, several Senators explained that its allowance of awards to defendants would serve "to deter the bringing of lawsuits without foundation," [59] "to discourage frivolous suits," [60] and "to diminish the likelihood of unjustified suits being brought." [61] If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis.[62]

Of course, the Court in *Christianburg* was not construing the language which is here alleged to foreclose a recovery by the government. *Christianburg* dealt with the content of the "prevailing party" standard whose purposes are less directly relevant to this case than the purposes, were they discernible, of the alleged execption for the federal government. Still, inasmuch as the language and history of the exception are inconclusive, it is sensible that the policies framing the section generally should inform as well the construction of its exceptions.

The possibility of tension between the purposes described in *Christianburg* is apparent. The policy question in this case is, simply stated, whether the social benefits of deterring vexatious suits against the government outweigh the social costs arising from the risk that some meritorious suits will be discouraged as well. Plaintiff argues that the Congress in 1972, acutely aware of both the pervasiveness of discrimination in federal employment and inadequacy of existing remedies, could not

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[59] Remarks of Senator Lausche, *id.*, at 13668.

[60] Remarks of Senator Pastore, *id.*, at 14214.

[61] Remarks of Senator Humphrey, *id.*, at 6534.

[62] *Christianburg Garment Co.*, 434 U.S. at 420 (original notes renumbered and reproduced as notes 58-61 *supra*).

have intended to create the "deterrent of the prospect of liability for fees if the employee loses." [63] Such a deterrent is said to be particularly inappropriate inasmuch as the whole initiative for judicial enforcement of Title VII against the federal government lies with the private individual. The EEOC and the attorney general are not permitted to proceed against the government as they are against other employers.[64] Thus the possibility that the prosecution of meritorious claims might be "chilled" by the likelihood of their being mischaracterized as in bad faith is thought especially pernicious.

We think plaintiff's arguments are largely overdrawn. The alleged chill on potentially valid litigation would occur only if government employees with meritorious Title VII suits believed that courts were likely so to mischaracterize those suits as to find them not only without merit, but wholly vexatious as well. We do not believe either that courts are likely so thoroughly to misapprehend the character of claims or that prospective plaintiffs are likely to expect such errors. The Supreme Court in *Christianburg* apparently did not suppose there would be an unacceptable chill if prevailing defendants in the private sector were permitted to recover attorneys' fees upon a far lesser showing than bad faith (i.e., that the suit was "frivolous, unreasonable or without foundation.") [65] Plainly, that possibility is considerably more remote here.

Of course, a court must still be wary of indulging *post hoc* characterizations which neglect the apparent prospects of a claim before trial. The cautionary language of the Court in *Christianburg* pertains *a fortiori* in such cases as this:

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[63] Brief for Plaintiff at 21.

[64] *Compare* 42 U.S.C. § 2000e-16(c) *with* 42 U.S.C. § 2000e-5(f).

[65] *Christianburg Garment Co.*, 434 U.S. at 421.

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.[66]

Thus we contemplate that courts will be appropriately circumspect in finding a party to have acted in bad faith. We doubt that such a finding may be supported without some proof of malice entirely apart from inferences arising from the possibly frivolous character of a particular claim. Only in this manner would we assure a sensible distinction between the contents of the equitable and statutory exceptions to the American rule. If, as seems probable, Congress chose to exclude the United States from the statutory "prevailing party" recovery in all cases, we are obliged to observe closely such a distinction.

Satisfied, then, that a recovery by the United States in this case will not embarrass the policy of enforcement, we are naturally more certain that it will help to discourage those few suits whose only motivation is harassment. The Court recognized in *Christianburg* that though Congress intended that individuals would fully vindicate the antidiscrimination policy of Title VII, still

[66] 434 U.S. at 421-22.

> "it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary judicial process." [67]

It is the need to preserve the integrity of the judicial process which ultimately, in the face of inconclusive statutory language and legislative history, convinces us that Congress would not have wished to foreclose recovery here. Litigation brought merely to harass is a wholly unredeemed burden and affront to the judiciary. While its unfairness when the defendant is the United States is somewhat more diffuse than the imposition on a private defendant in the same circumstances, it is not more sufferable. We think it unlikely, in light of the purposes of the "bad faith" exception,[68] that Congress intended through § 706(k) to remove the court's discretion to award attorneys' fees in such circumstances as these. When, as here, there is a solidly grounded finding by the

[67] *Id.* at 419.

[68] We are somewhat persuaded in our view by the analogous grounds for recovery of fees contained in Federal Rule of Civil Procedure 37. Rule 37 authorizes a court in certain circumstances to assess attorneys' fees against a party who has abused the discovery process. The theory is essentially the same as that in this case. Fair and liberal discovery is elementary to civil litigation. To maintain the process, the award of fees operates as a sanction, deterring abusive practices and incidentally compensating the aggrieved party for unnecessary costs. We doubt it would be argued seriously that § 706(k) preempts a recovery of fees under Rule 37. Such a construction would not appear sensible. Rule 37 has a narrow purpose which can be accommodated easily within the framework of § 706(k). Moreover, one would expect Congress intended as much. Likewise, we think it unlikely that Congress intended through § 706(k) to foreclose an award of fees in the exceptional case in which the whole suit is pursued in bad faith. As with Rule 37 it is probable, in light of the purposes of the exception, Congress would have left it alone when it adopted § 706(k).

trial court of bad faith on the part of the plaintiff, a fact finding which this court has no reason to upset, we have no intention of sanctioning bad faith in judicial proceedings by denying the defendant government its established right to recover attorneys' fees as a deterrent to bad faith litigants.[69]

Affirmed.

[69] Sufficient abuse of the judicial process could overwhelm the courts and destroy the judicial system as an effective branch of government. This, and any discernible degree thereof, such as the bad faith litigation found here, the courts have a constitutional duty to prevent. By our interpretation of the statute involved we have found here no intent of Congress to permit any abuse of the judicial process.

OPINION OF THE DISTRICT COURT,

AUGUST 22, 1977.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 76-1156

==========

BARBARA N. COPELAND,

Plaintiff,

v.

SAMUEL R. MARTINEZ,

Defendant.

==========

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before this Court on June 27, 1977. Having considered all the evidence, both testimonial and documentary, the Court enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff is a black female citizen of the United States who resides in the District of Columbia.

2. Defendant is the Director and chief executive officer of the Community Services Administration (CSA), an agency of the Federal Government.

3. Plaintiff is employed as a GS-11 Program Specialist in the Office of Human Rights (OHR) of the CSA.

4. Plaintiff is not a college graduate and holds no degree from an institution of higher education, although she has a number of college credits.

5. OHR is the CSA component which deals with Equal Employment Opportunity (EEO) programs, both within and outside the CSA.

6. From April 1, 1975, through the end of calendar year 1976, Carlos Ruiz was Associate Director for Human Rights of the CSA. In that capacity, Mr. Ruiz administered OHR and served as plaintiff's supervisor.

7. Plaintiff began her term of federal employment as a GS-5 Clerk Typist in February 1969 with the Office of Equal Opportunity, the predecessor agency of CSA. In February 1970, plaintiff was promoted to Secretary Typist GS-6. Plaintiff was promoted to Administrative Assistant GS-7 in April 1971. In January 1975, plaintiff was retroactively promoted to Program Assistant GS-9 effective July 1973 and to Program Specialist

GS-11 effective July 1974, the position she now holds.

8. Plaintiff's last two grade promotions resulted from her filing a grievance and complaint not involving race or sex discrimination.

9. Plaintiff filed no less than nine grievances and EEO complaints against Carlos Ruiz when he was her supervisor.

10. Throughout her employment with the Federal Government, plaintiff had filed numerous grievances and EEO complaints in addition to the one presently before this Court.

11. Plaintiff has consistently used grievances, threats of filing grievances, EEO complaints, threats of EEO complaints, and the EEO process in general to harass her supervisors and to improperly further her career and enhance her office status.

12. During the entire period relevant to this case, blacks comprised 80 percent of the OHR staff and females outnumbered males by a ratio of two to one.

13. While he headed OHR, Carlos Ruiz promoted mostly black females.

14a. There is no credible evidence that Carlos Ruiz denied plaintiff a career ladder promotion to Program Specialist GS-12 because of her race and/or sex or as a reprisal for her filing discrimination complaints previously.

Rather, the evidence shows that Mr. Ruiz, objectively and without regard to illegal considerations, concluded that the career ladder for plaintiff's position ended at the GS-11 level, a conclusion which was later supported by the CSA Director of Personnel based on an objective and independent desk audit of plaintiff's position.

b. The audit of plaintiff's position was independent of OHR and totally in accordance with procedures established by the Civil Service Commission.

15. There is no credible evidence that Carlos Ruiz denied plaintiff the first merit promotion of which she complains because of her race or sex or as a reprisal for filing discrimination complaints previously. Rather, the merit promotion announcement resulted in no selection when Mr. Ruiz, objectively and without regard to illegal considerations, asked for a wider search for candidates because the qualified list, on which plaintiff was rated lower than the other candidates, contained only two names, a practice that was common when qualified lists contained less than three names.

16a. There is no credible evidence that Carlos Ruiz denied plaintiff the second merit promotion of which she complains because of her race or sex or as a reprisal for her filing discrimination complaints previously. Rather, Mr.

Ruiz selected a white female because she was rated highest on the qualified list on which plaintiff was rated lowest.

b. With respect to the second merit promotion of which plaintiff complains, Mr. Ruiz, in the supervisory evaluation which was factored into the qualified list rating, had rated a black female higher than the successful white female.

17. There is no credible evidence that Carloz Ruiz denied plaintiff the third merit promotion of which she complains because of her race or sex or as a reprisal for her filing discrimination complaints previously. Rather, Mr. Ruiz selected a black female because she was rated highest on the qualified list on which plaintiff was rated lowest.

18. Carlos Ruiz' decision regarding each merit promotion of which plaintiff complains was blind as to race, sex, and plaintiff's history of filing complaints and grievances; when Mr. Ruiz made a selection, he selected the highest rated of the qualified candidates solely because the candidate was rated highest, following his unerring practice and irrespective of his personal views; when he asked for a wider search, he followed a common practice without regard to illegal considerations.

19a. A black female experienced personnel official compiled the qualified lists on which Carlos Ruiz based his decisions regarding the merit promotions of which plaintiff complains. She gave each candidate scores in various categories based on her review of the candidate's federal employment application (Standard Form 171) and supervisor's evaluation. The supervisor's evaluation counted for a maximum of 15 points out of 100 points.

b. Carlos Ruiz was the supervisor of each candidate rated by the personnel official.

c. Carlos Ruiz rated plaintiff "not ready" for promotion in his supervisory evaluation of her.

20. There is no credible evidence to support plaintiff's allegations that she was denied training because of her race or sex or as a reprisal for her filing discrimination complaints previously. Rather, plaintiff was denied training because of the heavy workload of OHR, because of her capabilities or lack thereof, because of her attitude toward her work and supervisors, because of budget limitations, or because all requests for individual training were being denied, without regard to illegal considerations.

21. There is no credible evidence to support plaintiff's allegations that she was denied the opportunity to perform at her full potential and

harassed by her supervisors because of her race and sex or as a reprisal for her filing discrimination complaints previously.

22. Plaintiff's testimony contained no evidence of illegal discriminatory treatment other than her bald, abstract, and repetitive allegations of the same.

23. The testimony of plaintiff's two witnesses other than herself contained absolutely no evidence of sex discrimination; one witness spoke in abstract terms of reprisal, and both spoke of race discrimination in such terms.

24. Both of plaintiff's nonparty witnesses were shown to be intensely biased against Carlos Ruiz. Both had filed several individual grievances and EEO complaints against Ruiz. One, O. Marion Jones, was shown to have designs on Ruiz' job as Associate Director, a fact he first denied but later admitted.

25. The testimony of plaintiff and Mr. Jones, their demeanor on the stand, and the documentary evidence submitted by both plaintiff and defendant demonstrated that both were completely incredible as witnesses. One factor affecting the Court's assessment of their credibility was the showing and admission by plaintiff and Mr. Jones that they had fabricated and submitted a supervisory rating of plaintiff by Mr. Jones misrepresenting that Mr. Jones was her

supervisor and that plaintiff had misrepresented on a Standard Form 171 that Jones, rather than Carlos Ruiz, was her supervisor.

26. To the extent that the testimony of plaintiff's nonparty witness other than Mr. Jones was relevant, it was not credible.

27. The testimony of defendant's witnesses was entirely credible and supported, complemented, and corroborated by the testimony of other witnesses and by documentary evidence.

28. The evidence demonstrates conclusively that plaintiff and Mr. Jones intentionally conducted a vendetta against Mr. Ruiz and other members of the CSA management, harassing them by virtually every means available including use of the EEO process to bring baseless charges of discrimination.

29. This civil action is an integral part of plaintiff's vendetta against Mr. Ruiz and the CSA management; it is the culmination of a long series of intentionally vindictive and abusive actions taken to harass her supervisors.

30. Plaintiff's allegations of discrimination are baseless and frivolous.

31. Plaintiff acted vexatiously, maliciously, and in bad faith in bringing and maintaining this action and has intentionally abused the judicial process.

CONCLUSIONS OF LAW

1. Plaintiff failed to establish even a prima facie case of discrimination based on sex and/or race or as to reprisal. The defendant amply demonstrated that no discrimination because of race or sex and no reprisal were involved in the treatment of plaintiff. As a result, the case must be dismissed with judgment for the defendant. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Hackley v. Roudebush, 520 F.2d 108 (D.C. Cir. 1975).

2. Moreover, the Court having found that plaintiff has brought this action in bad faith, with an intent to harass her supervisors and generally vex the defendant through her abusive conduct, and that such action constitutes an intentional abuse of the judicial process by plaintiff, the Court awards defendant his costs of this litigation including reasonable attorneys' fees. The Court recognizes that attorneys' fees are not ordinarily recoverable by prevailing parties in American litigation.[1/] However, the the instant case falls well within the historically established exception to the American Rule

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1/ Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 262 (1975); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

in that "the losing party [here] has 'acted in bad faith, vexatiously, wantonly [and] for oppressive reasons'." See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 221 U.S. 240, 259 (1975), quoting F. D. Rich Co. Inc. v. United States ex rel Indus. Lumber Co., 417 U.S. 166, 129 (1974).[2/] Further, the Court notes that this same standard has been applied (and fees awarded thereunder) to an application for attorney's fees of a prevailing title VII defendant in the private sector. See Carrion v. Yeshiva Univ., 535 F.2d 722 (2nd Cir. 1976); U.S. Steel Corp. v. U.S., 517 F.2d 359 (3rd Cir. 1975). Title VII applies equally to the public sector as the private sector; the rights of the parties are the same whether the action stems from a stituation in fedral employment or in employment in other sectors of the economy. See Chandler v. Roudebush, 425 U.S. 840 (1976). Therefore, this Court, applying the same standards for attorneys' fees awards in the instant case as have been previously established, awards defendant his reasonable attorneys' fees upon proof of the

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2/ See also Burgess v. Hampton, Civil No. 76-0836 (D.D.C. Jan. 12, 1977); 6 Moore's Federal Practice ¶ 54.77(2), at 7109 (1976).

same within a reasonable time.[3/]

3/ In awarding reasonable attorneys' fees to the Government, the Court expressly relies on equitable considerations, implicit in the American rule, separate and apart from the statute. Title VII explicitly allows courts in their discretion to grant attorneys' fees to "the previaling party, other than the Commission (Equal Employment Opportunity Commission) or the United States." 42 U.S.C. § 2000e-5(k). This section was part of the 1964 Civil Rights Act which outlawed private employment discrimination. It was then incorporated by reference in the 1972 amendments to the Act, which extended title VII's protections to federal employees. It seems clear that an agency of the federal government acting as a party defendant in a title VII suit must be entitled to at least the same nonstatutory traditional remedies available to private employers in the same circumstances. See discussion of legislative history in Grubbs v. Butz, 548 F.2d 973, 976 & n.15 (D.C. Cir. 1976). The legislative history of the 1972 amendments is completely silent as to any intent of such amendments to ban or to allow awards of attorneys' fees for prevailing governmental agency defendants. Therefore, without explicit congressional action to the contrary, the customary fee rules outlined in Alyeska, supra, apply, and defendant in the instant case is entitled to fees under that rule. See Carrion v. Yeshiva University, supra; Burgess v. Hampton, supra; U.S. Steel Co. v. United States, 519 F.2d 359 (3rd Cir. 1975).

3. The Court awards defendant such costs as he may have expended in litigating this action upon proof of same. See, Fed. R. Civ. P. 54(d).

An Order consistent with the foregoing has been entered this day.

John H. Pratt
United States District Judge

August 22, 1977

ORDER OF THE DISTRICT COURT,

AUGUST 22, 1977.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 76-1156

==========

BARBARA N. COPELAND,

Plaintiff,

v.

SAMUEL R. MARTINEZ,

Defendant.

==========

O R D E R

Consistent with the Findings of Fact and Conclusions of Law entered herein it is by the Court this 22nd day of August, 1977,

ORDERED:

(1) Judgment is hereby awarded to defendant and plaintiff's action is dismissed with prejudice;

(2) Defendant is hereby awarded the costs of this litigation including reasonable attorneys' fees;

(3) Defendant within twenty (20) days shall make application to the Court for said attorneys' fees, said application to be accompanied by all necessary supporting documentation.

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John H. Pratt
United States District Judge

ORDER OF THE DISTRICT COURT,

OCTOBER 7, 1977.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 76-1156

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BARBARA N. COPELAND,

Plaintiff,

v.

SAMUEL R. MARTINEZ,

Defendant.

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O R D E R

The Court has considered defendant's Application For Award of Costs Including Resonable Attorneys' Fees, Memorandum in Support thereof, and the affidavits attached thereto. Said Application was submitted pursuant to our Order of Dismissal of August 22, 1977. Although served with the same on September 16, 1977, neither plaintiff nor her attonrey of record has made response. As a result of its consideration, the

Court finds that the costs applied for are reasonable and fully supported by the documentation accompanying the Application. Accordingly, it is this 7th day of October,

ORDERED, that:

(1) Defendant is awarded costs in the total amount of $3,520.89, including attorneys' fees in the amount of $3,193.40;

(2) Defendant is granted judgment against plaintiff in the foregoing total amount of $3,520.89.

_____

John H. Pratt
United States District Judge

SUPREME COURT, U.S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

No. 79-647

In the Supreme Court of the United States

OCTOBER TERM, 1979

BARBARA N. COPELAND, PETITIONER

v.

SAMUEL R. MARTINEZ, DIRECTOR,
COMMUNITY SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-647

BARBARA N. COPELAND, PETITIONER

v.

SAMUEL R. MARTINEZ, DIRECTOR,
COMMUNITY SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that Section 706(k) of Title VII of the Civil Rights Act, 42 U.S.C. 2000e-5(k),[1] deprives the district courts of their historic equitable power to assess attorneys' fees against a party who has acted in bad faith whenever the party acting in bad faith is a Title VII plaintiff bringing suit against the United States.

1. In this Title VII action, the trial court found that petitioner "acted vexatiously, maliciously, and in bad

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[1]Section 706(k) provides in relevant part (42 U.S.C. 2000e-5(k)):

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs * * *."

faith in bringing and maintaining this action and has intentionally abused the judicial process" (Pet. App. 30a). The court found that her allegations of discrimination were "baseless and frivolous" (*ibid.*), that she had "consistently used grievances, threats of filing grievances, EEO complaints, threats of EEO complaints, and the EEO process in general to harass her supervisors and to improperly further her career and enhance her office status" (*id.* at 25a). The court stated that "[t]he evidence demonstrates conclusively that [petitioner] * * * intentionally conducted a vendetta against * * * the CSA management, harassing them by virtually every means available including use of the EEO process to bring baseless charges of discrimination" (*id.* at 30a). Relying on its inherent equitable power to award attorneys' fees in actions brought in bad faith and for oppressive reasons (*id.* at 32a-33a), the district court awarded the United States costs of $3,520.89, including an attorneys' fee of $3,193.40 (*id.* at 38a).

On appeal, petitioner did not challenge the finding by the district court that she had brought this action in bad faith. Instead, petitioner argued only that Section 706(k) of Title VII deprives the court of any power to award attorneys' fees to the United States in Title VII actions, even in cases involving intentional abuse of the judicial process. The court of appeals rejected that claim, holding that Section 706(k) does not abrogate the courts' common law authority to penalize a party who brings suit in bad faith by awarding attorneys' fees (Pet. App. 21a):

> It is the need to preserve the integrity of the judicial process which ultimately, in the face of inconclusive statutory language and legislative history, convinces us that Congress would not have wished to foreclose recovery here.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or the other courts of appeals. Further review of the decision in this case is therefore unwarranted.

Petitioner acknowledges that it has long been established, even under the limited American common law rule, that attorneys' fees may be awarded against a party who has initiated and conducted litigation in bad faith. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-259 (1975). Petitioner argues, however, that in enacting Section 706(k) of Title VII, Congress implicity preempted this common law rule in suits brought against the United States under that Title. The court of appeals properly rejected petitioner's contention.

Section 706(k) was enacted to expand the common law attorneys' fee rule in Title VII actions by providing that attorneys' fees may be awarded in such actions to any "prevailing party," 42 U.S.C. 2000e-5(k). A prevailing plaintiff or defendant thus need not show that an action or defense was urged in bad faith to obtain attorneys' fees under Title VII. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). At the same time, however, Section 706(k) provides that attorneys' fees may not be awarded under Title VII to the United States. But, as the court of appeals concluded (Pet. App. 11a):

> the excepting language [of Section 706(k)] * * * was meant to exclude the United States only from the *statutory* allowance of fees, governed by the expansive "prevailing party" standard, and to leave undisturbed the narrow equitable exception in cases of bad faith.

Petitioner argues (Pet. 6-14) that, under *Brown* v. *GSA*, 425 U.S. 820 (1976), the remedies afforded by Title VII should be exclusive and that, because the government is not entitled to obtain attorneys' fees under

Section 706(k), it may not be awarded fees in any Title VII litigation. But, as the court of appeals emphasized, the award of attorneys' fees under the common law rule is punitive, not remedial. It is designed "to preserve the integrity of the judicial process" in actions brought in bad faith or for the purpose of harassment (Pet. App. 21a).

As this Court stated in *Hall* v. *Cole*, 412 U.S. 1, 5 (1973) (emphasis added):

> [I]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." * * * In this class of cases, *the underlying rationale of "fee shifting" is, of course, punitive*, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

See also *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978). Because the award of attorneys' fees against a party acting in bad faith is designed to preserve the integrity of the judicial process and is only "incidentally" remedial (Pet. App. 21a n.68), the court of appeals correctly held that Section 706(k) does not withdraw the court's discretionary authority to award fees against a Title VII plaintiff whose claims are "baseless and frivolous" and are brought in bad faith to harass supervisors and obtain unmerited promotions (Pet. App. 25a-30a).

Petitioner suggests (Pet. 20) that "the *in terrorem* effect of the possibility of an award of counsel fees under any circumstances would seriously inhibit the enforcement of the Act." But, as the court of appeals noted (Pet. App. 19a), the common law attorneys' fee rule has not chilled the filing of lawsuits in general and it will not

have that effect under Title VII. The common law attorneys' fee rule would deter the enforcement of Title VII only if employees with meritorious claims believed that the courts were likely to so mischaracterize or misconstrue their complaints as to find them not only without merit, but vexatious and intentionally abusive of the judicial process as well. Such a result is not likely to occur. Moreover, in *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 421, the Court determined that prevailing defendants in private Title VII litigation could recover attorneys' fees on a far lesser showing than bad faith, despite the fact that "the plaintiff is the chosen instrument of Congress to vindicate [the policies of Title VII]." 434 U.S. at 418.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

DOJ-1979-12

Supreme Court, U. S.
FILED
JAN 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-647

BARBARA N. COPELAND,

Petitioner,

v.

SAMUEL R. MARTINEZ, Director,
Community Services Administration.

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-647

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BARBARA N. COPELAND,

Petitioner,

v.

SAMUEL R. MARTINEZ, Director,
Community Services Administration.

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PETITIONER'S REPLY TO THE
MEMORANDUM FOR THE RESPONDENT IN OPPOSTION

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1. Petitioner first notes that the government has responded to virtually none of the arguments presented in the petition for writ of certiorari. Thus, the Memorandum in Opposition does not mention, let alone address, the language in Brown v. GSA, 425 U.S. 820, 832 (1976), holding that § 2000e-5(k) governs the award of counsel fees in a federal Title VII action.

2. Similarly, the government quotes that part of Hall v. Cole, 412 U.S. 1, 5 (1973), which notes the general power of the federal courts to award fees in bad faith cases, but fails

to discuss Hall's further holding, noted in the peitition for certiorari, that

> This [the discussion of general principles] does not end our inquiry, however, for even where "fee-shifting" would be appropriate as a matter of equity, Congress has the power to circumscribe such relief. In Fleischmann Distilling Corp. v. Maier Brewing Co., supra, for example, we held that § 35 of the Lanham Act ... precluded an award of attorneys' fees. ... Since § 35 "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed" Congress must have intended the express remedial provisions of § 35 "to mark the boundaries to award monetary relief in cases arising under the Act."

412 U.S. at 9-10.

3. The government also does not discuss Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), which, petitioner urges, directly governs this case.

4. The Memorandum in Opposition ignores the legislative history of the Civil Rights Attorney's Fee Act of 1976, which makes it clear that the relevant language of 42 U.S.C. § 1988, which is identical to that of § 2000e-5(k), is an absolute prohibition of an award of fees to the United States. In addition to those instances already noted in the Petition for a Writ of Certiorari at pp. 11-14, petitioner calls the Court's attention

to the statement of Congressman Drinan in introducting the bill to the House subcommittee:

> [U]nder these bills the Federal government could never recover its attorney fees. On the other hand, it would be required to pay the counsel fees of a private prevailing party ...

AWARDING OF ATTORNEYS' FEES, Hearing Before the House Judiciary Subcommitte on Courts, Civil Liberties, and the Administration of Justice, (94th Cong., 1st Sess.) p. 53 (1975) (emphasis added).[1/]

5. Finally, petitioner wishes to reemphasize that just because counsel fees are not awardable, it does not follow that there is nothing to deter plaintiffs from filing meritless Title VII suits against the federal government. The far greater resources available to the United States, the cost of retaining counsel when there is little prospect of recovering fees, and the power of the court to award the other costs of

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1/ The Department of Justice, in its testimony in support of the bill, indicated that it understood thay the United States could not recover fees in a case covered by it. See, testimony of Rex E. Lee, Assistant Attorney General for the Civil Division, Hearings, supra at pp. 176-177.

litigation to the government are all substantial protections against abuses of the judicial system.

CONCLUSION

In sum, petitioner urges that the decision below is in direct conflict with the decisions of this Court in Brown v. G.S.A., supra, and Fleischmann Distilling Corp. v. Maier Brewing Co., supra, and therefore should be reviewed.

Respectfully submitted,

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